BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANNA R. VETTE Claimant	)	
VS.	)	
CENTRAL KANSAS MEDICAL CENTER Respondent	)	Docket No. 1,028,041
AND	)	
INDEMNITY INS. CO. OF NORTH AMERICA Insurance Carrier	)	

ORDER

Claimant requested review of the September 20, 2007 Award by Administrative Law Judge (ALJ) Bruce E. Moore. The Board heard oral argument on December 11, 2007.

APPEARANCES

Mitchell W. Rice, of Hutchinson, Kansas, appeared for the claimant. Christopher D. Werner, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. In addition, the parties have stipulated that if this claim is found compensable, the Board shall modify the Award to reflect a 41 percent impairment of function to the left upper extremity at the level of the shoulder consistent with the opinions of Dr. Munhall.

ISSUES

The ALJ concluded the claimant failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment. He specifically found that the claimant fell in a parking lot over which the respondent had exercised no express control. Therefore, he found the claimant's claim was barred by the "going and coming" rule expressed in K.S.A. 44-508(f).

The claimant requests review of this Award alleging that she was injured on respondent's premises and her claim is not precluded by the "going and coming" rule. Conversely, respondent contends the ALJ's Award should be affirmed and compensation denied as the claimant was in a public parking lot, before her workday had begun. Accordingly, the "going and coming" rule precludes any award in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

The "going and coming" rule contained in K.S.A. 2006 Supp. 44-508(f) provides in pertinent part:

> The words 'arising out of and in the course of employment' as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a provider of emergency services responding to an emergency.
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> K.S.A. 2006 Supp. 44-508(f) is a codification of the "going and coming" rule developed by courts in construing workers compensation acts. This is a legislative declaration that there is no causal relationship between an accidental injury and a worker's employment while the worker is on the way to assume the worker's duties or after leaving those duties, which are not proximately caused by the employer's negligence.[1]

In *Thompson*,[2] the Court, while analyzing what risks were causally related to a worker's employment, wrote:

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[1] *Chapman v. Victory Sand & Stone Co.*, 197 Kan. 377, 416 P.2d 754 (1966).

[2] *Thompson* v. *Law Office of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment.

But K.S.A. 2006 Supp. 44-508(f) contains exceptions to the "going and coming" rule. First, the "going and coming" rule does not apply if the worker is injured on the employer's premises.[3] Another exception is when the worker is injured while using the only route available to or from work involving a special risk or hazard and the route is not used by the public, except dealing with the employer.[4] In this matter, there is no contention that claimant was using a dedicated route at the time of her injury. Instead, claimant contends she was injured on respondent's "premises", a parking lot adjacent to the respondent's business that is provided for respondent's employees as well as those who work in the same building and other surrounding businesses.

The ALJ relied on the recent Kansas Supreme Court decision in Rinke[5] and concluded that the going and coming rule precluded claimant's claim because there was no proof that respondent had exercised control over the parking lot where claimant fell. In support of his finding, the ALJ referenced the fact that claimant was never told of any rules regarding where to park her car, whether in the parking lot where she fell or elsewhere. Moreover, he relied on the fact that there was no evidence within the record of any rules or instructions regarding parking in the lot where claimant fell, whether promulgated by respondent or the landlord. The parking lot was open to the public and served not only respondent's employees, but other employees from businesses in the surrounding buildings. Respondent had its *own* parking lot several blocks away to the west but claimant chose not to park there as the adjacent lot was closer.

Claimant argues that *Rinke* actually supports her position that the parking lot constituted part of respondent's premises. But the Board disagrees. In *Rinke*, the greater weight of the evidence indicated the employer exercised greater control of the parking lot where Rinke slipped and fell than in this case. In *Rinke*, the claimant's employer, a bank, was given access to 97 percent of the parking area and its employees were instructed to park within a certain area. This reflects the fact that Ms.Rinke's employer occupied a majority of the tenant space in the building. The adjacent parking lot in *Rinke* was not open to the public and as a practical matter, only those who worked in the adjacent building would park in this lot. The employer in that case also had the right to install an automatic teller machine in the parking lot.

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[3] *Id.* at Syl. ¶ 1. Where the court held that the term "premises" is narrowly construed to be an area, controlled by the employer.

[4] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[5] *Rinke v. Bank of America*, 282 Kan. 746, 148 P.3d 553 (2006).

Here, claimant was given no direction whatsoever as to where she should park. In fact, she was not compelled to park in this lot at all. The lot served not only her employer's employees, but other employees within the building as well as other surrounding buildings.

Like the ALJ, the Board concludes that the degree of control by respondent which was found to exist in *Rinke* has not been shown to be present in this case. The Board finds that the fall occurred in a common area over which respondent did not exercise sufficient control to treat as its premises. It follows then that the ALJ's Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Bruce E. Moore dated September 20, 2007, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of January 2008.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Mitchell W. Rice, Attorney for Claimant
Christopher D. Werner, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge